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Jan. 22. 1879

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. ~~354~~. 124

THE MICHIGAN CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

CHARLES W. SLACK, COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

**FILED MARCH 31, 1877.**

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## No. 354.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the Michigan Central Railroad Company, a corporation established under the laws of the State of Michigan, having its principal business office in Boston, in the district of Massachusetts, plaintiff, and Charles W. Slack, of said Boston, collector of United States internal revenue, third collection district of Massachusetts, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1876, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] JOHN G. STETSON,
*Clerk of the Circuit Court of the United States,*
*District of Massachusetts.*

Allowed by—

DAN'L CLARK,
*U. S. Judge, ass'd to Mass. Dist.*

Sufficient service of this writ of error, and of citation thereunder, is acknowledged.

GEORGE P. SANGER,
*U. S. Att'y, for Def't in Error.*

2 Circuit court of the United States, district of Massachusetts, *ss.*

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of October, A. D. 1876.

[SEAL.] JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
*Massachusetts District, ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and seventy-six.

Before the honorable Nathan Clifford, associate justice.

THE MICHIGAN CENTRAL RAILROAD COMpany, a corporation established under the laws of the State of Michigan, having its principal business office in said Boston, plaintiff,

*v.*

CHARLES W. SLACK, OF SAID BOS-
4 ton, collector of United States internal revenue, third collection district of Massachusetts, defendant.

In an action of contract.

And the plaintiffs say that Wm. Raymond Lee, esq., assessor of internal revenue, third collection district of Massachusetts, on or about the 19th day of February, A. D. 1870, assessed a tax of $860.33 upon them, purporting to be an assessment and tax upon sterling bond interest paid in the previous month of January, and the plaintiffs aver that said assessment and tax were wholly illegal and void. And that afterwards to wit, on the 28th day of said February, to avoid the distraint and seizure of their property, threatened by said collector Slack, to enforce payment of said tax, they paid the amount of the same to him under protest, and that they are entitled to recover the same back from said collector Slack, and that said collector Slack now owes the same to them; to the damage of the said plaintiff company (as they say) the
5 sum of seventeen hundred dollars. The writ in this cause is dated the sixteenth day of August, A. D. 1871, and is made returnable before the justices of the superior court of the Commonwealth of Massachusetts then next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of October, A. D. 1871. This cause was removed from said superior court to this circuit court by writ of certiorari dated the twenty-second day of April, 1872, and made returnable before this circuit court on the fifteenth day of May, A. D. 1872. This cause was duly entered here at the October term of this court, A. D. 1871, and was thence continued from term to term to the October term of this court, A. D. 1872, when due return was made of said writ of certiorari, and the parties appeared by their respective attorneys. This cause was thence continued from term to term to the October term of this court, A. D. 1875, when, to wit, on the tenth day of February,
6 A. D. 1876, the following agreed statement of facts was filed, namely:

*Agreed statement of facts.*

Writ dated August 16, 1871, returnable to superior court, Suffolk County, Massachusetts, October term, 1871.

Removed by certiorari to United States circuit court, Massachusetts.

The claim is for the return of a tax or duty of $860.33, paid to said

collector, under protest, on the 28th day of February, 1870; which tax was assessed on or about the 19th day of said February on sterling bond interest paid by said company in London in gold, in the previous month of January, by cashing certain coupons which then fell due.

The coupons taxed as aforesaid were attached to certain sterling bonds issued by said railroad company, to the amount of £95,700, and negotiated by their agents in London in the year 1852, or early in
7 1853, many years before the passage of the first internal revenue law of the United States. These bonds were due in July, 1872, and were paid at maturity, in gold, in London.

So far as the company knows, not one of these bonds was ever held by any person in the United States, or by other than non-resident aliens, and the interest accruing was regularly paid in gold in full in London, without rebate or reservation of the United States internal revenue tax.

Appeal was duly made to the Commissioner of Internal Revenue before this suit was brought.

Jan. 31, 1876.

F. W. PALFREY,
*For Pl'ff.*
GEORGE P. SANGER,
*U. S. Att'y, for Def't.*

This cause thereupon came on to be heard by the court, the honorable Daniel Clark, district judge of the United States for the district of New Hampshire, duly assigned to hold said circuit court by the
8 honorable George F. Shepley, circuit judge, sitting and holding said court, and was fully argued by the counsel for the respective parties. This cause was thence continued to the May term of this court, A. D. 1876, when, to wit, on the third day of October, A. D. 1876, the opinion of the honorable Daniel Clark, district judge as aforesaid, that the defendant is entitled to judgment for his costs, is filed; and thereupon, to wit, October 3d, 1876, it is considered by the court, the honorable John Lowell, district judge, sitting, that the said Charles W. Slack, collector, defendant, recover of the said Michigan Central Railroad Company, plaintiff, his costs of suit, taxed at

* * * * * * *

A true record. Attest:

JOHN G. STETSON, *Clerk.*

The following is a copy of the opinion in accordance with which judgment was entered for the defendant October 3d, 1876, namely:

9 *Opinion of the court.*

MICHIGAN CENTRAL RAILROAD COMPANY, plaintiff,
*v.*
CHARLES W. SLACK, COLLECTOR, DEFENDANT.

OCTOBER 3, 1876.

CLARK, J.:

The case is well presented in the agreed statement of facts; and the sole question before the court is, whether Congress had power to impose the tax.

The statute of the United States provides that any railroad, canal, turnpike, canal-navigation, or slack-water company, indebted for any

money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any
10 such company that may have declared any dividend in scrip, or money due or payable to its stockholders, including non-residents, whether citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, including non-residents, whether citizens or aliens; and said companies are hereby authorized to deduct and withhold from all payments on account of any interest, or coupons, or dividends due and payable, as aforesaid, the tax of five per centum; and the payment of the amount of said tax so deducted from the interest or coupons, or dividends, and certified by the president or treasurer of said company, shall discharge said company from that amount of the dividend or interest, or
11 coupon on the bonds or other evidence of their indebtedness so held by any person or party whatever, except where said company have contracted otherwise. (14 Stat. at Large 138, 139.) In considering this statute, in the case of the United States v. Railroad (17 Wall. 322), the Supreme Court held that the tax imposed was upon the creditor and not upon the corporation; and the corporation is made use of as a convenient means of collecting the tax. But it is difficult to see how that decision can be made applicable in this case; because the corporation here paid the interest in full, for the reason, as stated in the brief of the plaintiff, that they had "otherwise contracted." If this be so, the case falls within the exception of the statute—"except where said company have otherwise contracted"—and the tax falls on the corporation, and not on the bondholder. But whether the tax authorized and im-
12 posed be upon the corporation or upon the bondholders, who in this case appear to be foreigners, we think the tax can be supported. The language of the statute is broad enough and explicit enough for that purpose. The language is "any railroad" indebted by bonds stipulating for interest "shall be subject to and pay a tax of five per centum on the amount of all such interest, whenever and wherever the same shall be payable, and to whatsoever party or person the same shall be payable, including non residents, whether citizens or aliens," and may deduct the tax paid from the interest due the bondholders, "except where said companies have otherwise contracted."

Speaking of this statute, in Railroad Co. v. Jackson (7 Wall., 269), Mr. Justice Nelson, who delivered the opinion of the court in that case, said, "The question hereafter will be, not whether the law embraces the alien non-resident holder, but whether it is competent for Congress
13 to impose it." Could Congress, then, impose this tax?

The Constitution of the United States says (Art. 1, sec. 8), "The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States"; that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration herein-before directed to be taken"; and that "no tax or duty shall be laid on articles exported from any State."

These are the only express provisions in the Constitution in regard to taxation, and they contain the only express restrictions upon Congress on that subject. There is nothing further as to the persons to be taxed,

nor as to the objects or manner of taxation. But it is very obvious that taxation cannot extend beyond the jurisdiction of the taxing power, and that the objects of taxation must be within its territorial limits; so it was decided in Railroad Company v. Pennsylvania (15 Wall., 300). In that case it was held that "bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the State in which the company was incorporated, they are property beyond the jurisdiction of the State." But the decision in that case was upon a taxation by the State of Pennsylvania, under a statute of that State very different from the statute of the United States now under consideration, and the decision was upon a ground, as the principal one, so entirely wanting in this case, that I have not found that case a satisfactory guide in this, though some of the reasons there presented are of weight here.

"Persons, property, and business," it is said, "are proper subjects of taxation." "It may touch property in every shape; in its natural condition, in its manufactured form and in its various transmutations." "It may touch business in its almost infinite forms in which it is conducted; in professions, in commerce, in manufactures and in transportation." "Unless restricted by the provisions of the Federal Constitution," the power of Congress "as to the mode, form, objects and extent of taxation is unlimited." (Railroad Company v. Pennsylvania, 15 Wall., 319.)

Now, applying these principles to the case under consideration, I think the tax must be sustained.

The statute provides "that any railroad, canal, turnpike, canal-navigation, or slack-water company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether citizens or aliens," * * "shall be subject to pay a tax of five per centum on the amount of all such interest or coupons, dividends or profits, whenever and wherever the same shall be payable, and to whatever party or person the same may be payable, including non-residents, whether citizens or aliens." Now, when this interest became due and payable, whose property was it? If it was the railroad's, then the railroad was rightfully taxed for it. If it was not the railroad's, then it was the bondholders', and was equally the subject of taxation, as it was within the jurisdiction of the taxing power, and the tax could be collected out of the fund under its control. The tax attached to this interest, as soon as it became due, in the hands of the railroad; and if, as the Supreme Court says, the railroad is only a convenient mode of collecting the tax, they are so because they have funds of the bondholders in their hands. The case is analagous to what is known in some of the States as the trustee process, by which the property, rights, or credits of one person is attached in the hands of another, as, if A owes B, a creditor of B may attach a debt due by A to B in the hands of A. The same thing is done in other States by the process of garnishment. There is another consideration of much force. Congress is the taxing power; at liberty to choose the objects of taxation, the methods, and the amount, under the restrictions of the Constitution. It may make its own laws for effectuating its purpose. In the internal revenue law of 1866, in the section just quoted, it has laid a tax on interest due from railroads on their bonds, eo nomine, and in this case

have collected it. If there were nothing to collect the tax out of, then the tax must fail. But in this case they have reached the fund, and have collected the tax out of the interest mentioned in the statute.
18 What is there in the Constitution of the United States to forbid this? And if there be nothing, what power has this court or any other court to say it shall not be done? If it be said this interest is not the fund of the bondholder, then it must follow that the bondholder is not taxed, because the tax is laid upon the interest. "Shall be subject to and pay a tax of five per centum on the amount of all such interest" are the words of the statute. In the case of the Railroad Company v. Pennsylvania (15 Wall., 320), Mr. Justice Field said that bonds issued by the railroad in that case were property undoubtedly, but property in the hands of the holders and not the property of the obligors. That is undoubtedly true when you speak of the bonds as such; the bonds are the property of the owners, but the fund out of which they are to be paid is in the hands of the obligors, and it is precisely the interest accruing from this fund that Congress has taxed in the hands
19 of the obligors. The remark made by Justice Field that this is not a legitimate exercise of the taxing power, must be held to apply to the case then before the court, which was a taxation by the State of Pennsylvania, which the court held impaired the obligation of a contract. But no such consideration arises here, and if a taxation by Congress be within the limits of the Federal Constitution, no contract between persons, natural or artificial, or States and persons, can be set up to defeat it. States cannot pass laws impairing the obligation of contracts, but there is no such restriction in the Federal Constitution upon the Congress as to the power of taxation. It is a question for their wisdom and discretion and not a constitutional prohibition. Objection is made that "such a taxation was in violation of the constitutional provisions, that all taxation should be uniform throughout the
20 United States, and that private property shall not be taken for public uses without just compensation, and that it was an attempt to tax subjects over which the sovereign power of the State did not extend." But it is difficult to see, and the court does not see, any particular in which the tax is not uniform throughout the United States. It is laid upon all railroads indebted by bond in the same amount and collected in the same manner. Its extent and *and* operation is the same for all within the United States. If it operates indirectly otherwise upon the non-resident, it is a sufficient answer to say that he is without the constitutional limit of the taxation, and the tax cannot be defeated on that account. The tax must be uniform throughout the United States, not beyond them.

The provision of the statute that the payment of the tax should discharge the company from so much of the interest, except where
21 the companies have contracted otherwise, extends to all railroads throughout the United States; if any company has contracted otherwise, it is an undertaking of their own, with which Congress wisely does not seek to interfere, but it cannot be set up to defeat the tax. That exception is uniform throughout the United States. The objection that the tax takes private property for public use without just compensation is equally untenable. We do not think that provision of the Constitution is applicable to taxation.

"A tax," says Mr. Justice Hunt, in the case of the United States v. Railroad Company (17 Wall., 326), "is understood to be a charge, a pecuniary burden, for the support of the government." It might be laid by an oppressive or very badly administered government, and no bene-

fit received from the payment of the tax by the tax-payer, and yet
22 the tax might be legal. Taking property for public use is where the land or other property of an individual is taken from him, and for the use of the government or public, and where, if the property were not paid for, the burden would fall chiefly upon the person whose property is taken, and not upon the public generally. In such case payment must be made to prevent inequality. Nor is it sufficient to defeat this taxation to allege that it was an attempt to tax subjects on which the sovereign power of the State did not extend. If by the word "subjects" persons be meant, the answer is that no attempt is made to tax persons; if by it property be meant, the answer is that property within the jurisdiction is a proper subject of taxation.

Judgment must be for the defendant.

23 UNITED STATES OF AMERICA,
*Massachusetts District, ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of the Michigan Central Railroad Company v. Charles W. Slack, in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of October, in the year of our Lord one thousand eight hunded and seventy-six, and of the Independence of the United States the one hundred and first.

[SEAL.] JOHN G. STETSON, *Clerk.*

24 *Bond on writ of error.*

Know all men by these presents that we, the Michigan Central Railroad Company, a corporation established under the laws of the State of Michigan, as principal, and Nathaniel Thayer and H. H. Hunnewell, both of Boston, in the district of Massachusetts, as sureties, are held and firmly bound unto Charles W. Slack, of said Boston, collector of United States internal revenue, third collection district of Massachusetts, in the full and just sum of three hundred dollars, to be paid to the said Charles W. Slack, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the Michigan Central Railroad Company, a corporation established under the laws of the State of Michigan, having its principal business office in said Boston, plaintiff, and the said Charles W. Slack, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said defendant citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1876:

Now the condition of the above obligation is such, that if the said plaintiff shall prosecute its said writ of error to effect, and answer all

damages and costs if it fail to make its plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

[SEAL.] MICHIGAN CENTRAL RAILROAD COMPANY,
By SAM. SWAN, *Pres't.* [L. S.]
NATHANIEL THAYER. [L. S.]
H. H. HUNNEWELL. [L. S.]

Signed, sealed, and delivered in presence of—
JAS. KRESCON.
JAMES H. BLAKE, as to N. T. & H. H. H.

Approved:

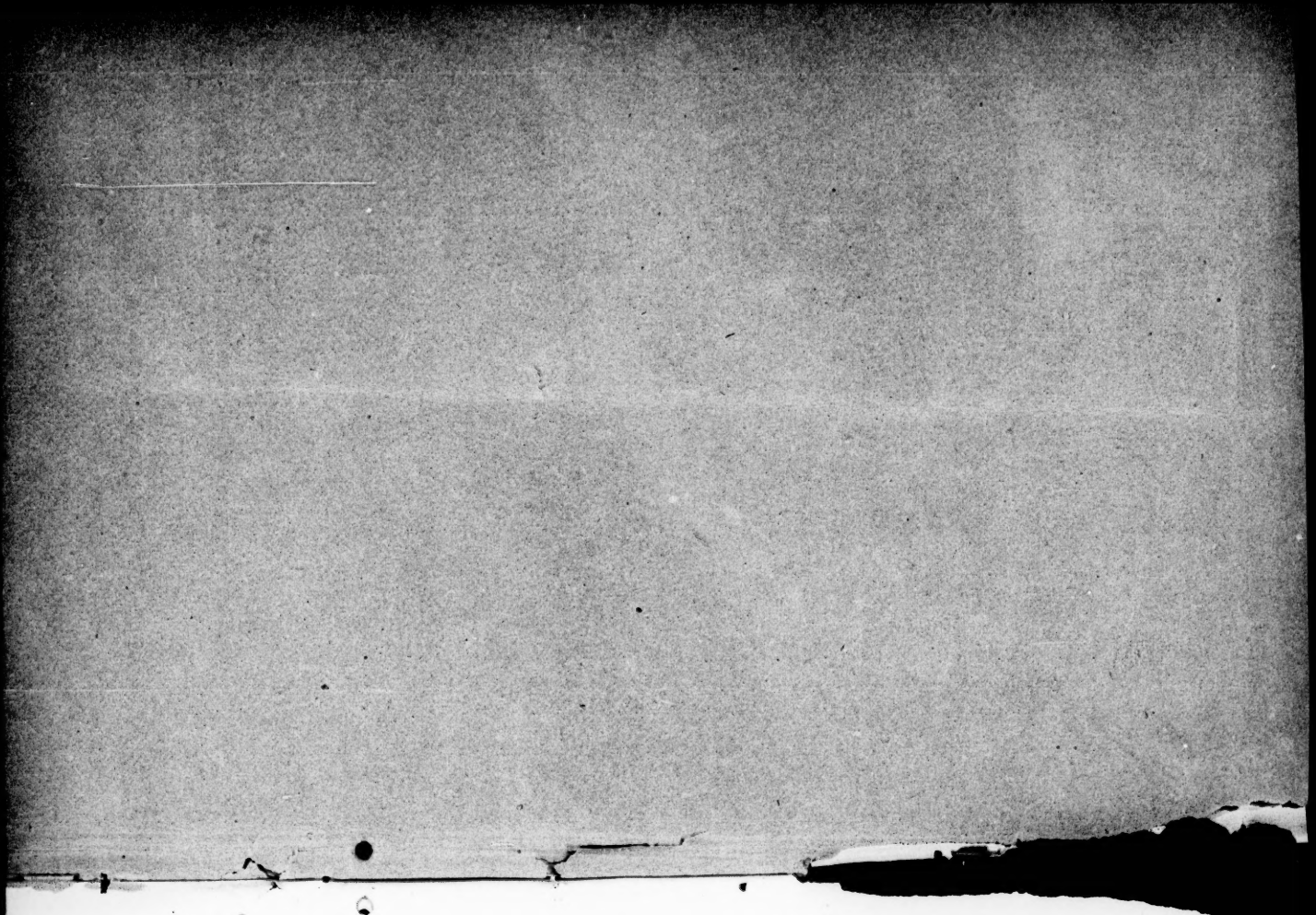
JOHN LOWELL,
*U. S. Dist. Judge, Mass. Dist.*

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
*Clerk U. S. C. C., Mass. Dist.*

(Indorsement on cover:) No. 354. The Michigan Central Railroad Company, plaintiff in error, vs. Charles W. Slack, collector of internal revenue. Massachusetts, C. C. U. S. Filed 31st March, 1877.



# Supreme Court of the United States.

— No. 124. —

# THE MICHIGAN CENTRAL R.R. CO.,

*Plaintiff in Error,*

VS.

# CHARLES W. SLACK,

COLLECTOR OF INTERNAL REVENUE.

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## BRIEF FOR THE PLAINTIFF IN ERROR.

BOSTON:

PRINTED BY T. W. RIPLEY, 138 CONGRESS STREET.

1879.

# Supreme Court of the United States.

No. 124.

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**The Michigan Central Railroad Company, Plaintiff in Error,**

vs.

**Charles W. Slack, Collector of Internal Revenue.**

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## BRIEF FOR THE PLAINTIFF IN ERROR.

FIRST.

The question which this case presents is as follows: —

Had Congress the power to impose the Internal Revenue tax on coupon interest, upon the coupons on bonds of a State Railway Corporation, which bonds and coupons were the property of non-resident aliens, the issue having been made before the passage of the first Internal Revenue Law of the United States?

In discussing this question, it is not necessary to inquire what limitations, or whether any, attached to the power of Congress to impose Internal Revenue taxation upon the gross receipts of Railway Corporations. We are not to consider what Congress might have done, but what it has done, and then the question will be whether it was competent for Congress to do what it has done.

The case stated finds that the Michigan Central Railroad Company, a Corporation established under the laws of the State of Michigan, issued a large amount of sterling bonds, and negotiated the same by their agents in London in the year 1852 or early in 1853; that so far as is known or alleged, not one of these bonds was ever held by any person in the United States, or by other than non-resident aliens; that the interest accruing was regularly paid in gold in full in London, without rebate or reservation of the United States Internal Revenue tax; that the bonds were paid at maturity in gold in London; that the Internal Revenue tax on the coupon interest of Railroad bonds was assessed upon the coupon interest on the bonds above-mentioned, in February, 1870, and paid by the Railroad Company under protest; that

appeal was duly made to the Commissioner of Internal Revenue, and this suit brought thereafter.

We have then to discuss the question of the legality of United States Internal Revenne taxation upon coupon interest on bonds issued by a State Railway Corporation, nine years and more before the passage of the first Internal Revenue Law of the United States, to non-resident aliens, and owned and held by such non-resident aliens at the date of the assessment and collection of the tax.

The case is brought here by writ of error to the Circuit Court of the United States for the District of Massachusetts.

The error assigned is that the Court below erred in finding that Congress had power to impose the tax in controversy, and that, upon the agreed statement of facts filed, judgment must be for the defendant in the Court below, the defendant in error here.

To assign the error more precisely, — that the Court below erred in finding that Congress had power to pass the law (XIV St. 139) of July 13, 1866, which imposed the Internal Revenue tax of five per cent. on the amount of all coupons of bonds of railroad and other companies, on the coupons on such bonds owned and held by non-resident aliens.

The Government has power "to lay and collect taxes, duties, "imposts and excises, to pay the debts and provide for the common "defence and general welfare of the United States."

But, to quote the language of the Court in

Loan Association *vs.* Topeka, 20 Wall. 655, 663,

"The theory of our Governments, State and National, is opposed to "the deposit of unlimited power anywhere. The executive, the legis- "lative, and the judicial branches of these governments are all of limited "and defined powers. There are limitations on such power which "grow out of the essential nature of all free governments, — implied "reservations of individual rights, without which the social compact "could not exist, and which are respected by all governments entitled "to the name. . . . . of all the powers conferred upon govern- "ment, that of taxation is most liable to abuse."

It is conceded that, subject to such limitations, the constitutional power of the Government to lay and collect taxes is absolute. I say the "constitutional power," because the Constitution both confers and limits the power.

"Where the power of taxation exercised by Congress is warranted "by the Constitution, as to mode and subject, it is necessarily unlimited "in its nature. Within the limits of the Constitution it is supreme in

"its action. These clauses — (Representatives shall be apportioned "among the several States which shall be included in this Union "according to their respective numbers, &c. Congress shall have "power to lay and collect taxes, duties, imposts, and excises, to pay "the debts and provide for the common defence and general welfare "of the United States; but all duties, imposts, and excises shall be "uniform throughout the United States. No capitation or other direct "tax shall be laid, unless in proportion to the census of enumeration "hereinbefore directed to be taken. No tax or duty shall be laid on "articles exported from any State) — contain the entire grant of the "taxing power by the organic law, with the limitations which that "instrument imposes."

Pacific Insurance Co. *vs.* Soule, 7 Wall. 433.

"The proper sanction of any act done under authority of the Con- "stitution, being challenged, must be found in its charter, or the act is "*ultra vires* and void."

Pacific Insurance Co. *vs.* Soule, 7 Wall. 433.

"It is the duty of the Court to compare the Act with the Consti- "tution, and if the former cannot, upon a fair construction, be reconciled "with the latter, to give effect to the Constitution rather than the "Statute."

Hepburn *vs.* Griswold, 8 Wall. 612.

That the maxim that taxation and representation should be inseparable is one to be obeyed to the spirit, — that our Government can exercise only the powers granted to it, — that its powers are limited and not to be transcended, — that all subjects over which the sovereign power of a State extends are objects of taxation, but that those over which it does not extend are, upon the soundest principles, exempt from taxation, — that the grant of power to lay taxes extends to all places over which the Government extends, — and that the power of taxation by any State is limited to persons, property, or business within its jurisdiction, are propositions laid down without qualification by this Court in the cases of —

McCullough *vs.* Maryland, 4 Wheaton, 405.
Loughborough *vs.* Blake, 5 Wheaton, 318.
Tappan *vs.* Merch. Nat. Bank, 19 Wall. 490.

Having arrived thus far, and bearing in mind the rule of decision constantly followed by this Court in determining questions of alleged unconstitutionality of legislation (Hepburn *vs.* Griswold, 8 Wall. 603, 610), the plaintiff in error proposes to endeavor to show that the Act

of Congress under which the tax in question was laid was clearly unconstitutional, in so far as it applied to non-resident aliens.

We need not pause to consider the *actual* power of the Government to impose the tax in controversy. There is no doubt of that. Just so it had the *actual* power to impose a tax of 5% or 50% or 100% upon debts payable by individuals to non-resident aliens, in other words, to confiscate the private property of citizens of a friendly nation. Most governments abstain from appropriating the private property even of belligerent enemies, but this act appropriated the private property of friendly neutrals. What we have to consider is, What is the *legal* power of the Government?

It will not be contended that the Government had the power to tax non-resident aliens directly. As *persons*, it is conceded that they are not liable to our taxation. But it is alleged that their *property* was within our jurisdiction, and therefore taxable.

To this we reply: —

I. That it is settled law in this Court that the Internal Revenue taxation on coupon interest is a tax on income, and so a tax on persons.

II. That the money set apart by the Railroad Company to pay the coupon interest due to its non-resident alien bondholders was not taxable property within the jurisdiction of the United States.

I. In support of the first proposition, it can hardly be necessary to do more than to place upon the brief the names of the cases in which it has received the attention of the Court. They are —

Haight *vs.* Railroad Co., 6 Wall. 15.
Railroad Co. *vs.* Jackson, 7 Wall. 262, 269.
Barnes *vs.* the Railroads, 17 Wall. 294.
U. S. *vs.* Railroad Co., 17 Wall. 322.
Stockdale *vs.* Ins. Cos., 20 Wall. 323, 330, 337.
Railroad Co. *vs.* Rose, 95 U. S. 78.

"The Companies at most were merely agents of the Government "to collect a tax from the shareholders and pay it over."

Stockdale *vs.* Ins. Cos., 20 Wall. 323, 341.
See also Haight *vs.* Railroad Co., 6 Wall. 15.

"When a dividend is declared to any shareholder whose dividend "is for any special reason exempt from tax, as in the case of the city of "Baltimore on her stock in the Railroad Company, then the Corpora- "tion declaring the dividend is not liable."

Stockdale *vs.* Ins. Cos., 20 Wall. 323, 330.
See also Bailey *vs.* Railroad Co., 22 Wall. 604, 632.

II. *a.* The locality of a bond debt is the locality of the creditor.

"A tax upon a bond given by a resident debtor, and the with-"holding of the amount from the interest due to the non-resident "holder, would seem to be a tax upon such non-resident. It is not a "tax on the money lent, because that belongs to the resident debtor, "for which he is taxable. It is a tax on the security, the bond, which "is in the hands of the non-resident holder."

Railway Co. *vs.* Jackson, 7 Wall. 262, 267.

"Bonds issued by a Corporation are property in the hands of the "holders, and have no *situs* independent of their domicile."

State Tax on Foreign Held Bonds, 15 Wall. 300, 324, 325.

"Debts are not property. A non-resident creditor of a city "cannot be said to be, in virtue of a debt due to him, a holder of "property within its limits."

Murray *vs.* Charleston, 96 U. S. 432.

It makes no difference that such bonds (*i. e.* bonds issued by a State Corporation) are secured by a mortgage of property within that State, if by its laws a mortgage is a mere security for a debt and transfers no interest in the mortgaged premises; such mortgage merely creates a lien, and confers on the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged. This right has no locality other than that of the holder.

State Tax on Foreign Held Bonds, 15 Wall. 300, 322.

Such was and is the law in the State of Michigan: —

"A mortgage is no longer in this State what it was originally at "the common law, — a grant of the land to the mortgagee, defeasible "upon condition subsequent, and to become absolute on failure to pay "at the specified time, — it is but a security for the debt. The estate "in the land is still in the mortgagor, and payment at any time before "a foreclosure becomes absolute, with the legal costs, if any, will "discharge the mortgage, and no reconveyance is necessary."

Caruthers *vs.* Humphrey, 12 Mich. 270.
Van Husan *vs.* Kanouse, 13 Mich. 303.

II. *b.* Interest on the bond debt of a Corporation, as soon as set apart for the non-resident alien bondholder, becomes his property, and follows his foreign domicile, and is not subject to domestic taxation.

The *situs* of such money changes the instant it is set apart for payment of interest. At one moment it is assets of the Corporation, and subject to taxation by the United States, by appropriate legislation; the next moment it is the property of the non-resident alien bondholder, and not taxable by any United States legislation. Such bondholder is a creditor of the Corporation, — a secured creditor, it may be, — and his bond is only the evidence of his debt. He does not own and cannot appropriate, as his aliquot share, any particular portion of the property of the Corporation. He can only join in or profit by foreclosure proceedings, in accordance with either the general provisions of law or the provisions of the mortgage, and if the mortgaged property does not satisfy his claim, he remains a creditor for the balance. He is merely a creditor, the owner and holder of a chose in action.

As for the interest, as money does not move itself, there must be an interval during which it is moving to the bondholder, and during a part of this interval it must be in the United States, and for so long the Government has the *actual* power to lay hands upon it. But we claim that in legal contemplation it passes directly from the Corporation to the foreign bondholder, and is only from physical necessity and for a limited time within the reach of the arm of the United States. It is submitted that to arrest it or any part of it in its journey from the Corporation to the foreign and alien bondholder, is simply an act of *vis major*, which no legislation can make legal. This view of the legal status of interest due to non-resident alien bondholders seems to rest on sound general principles, and to be recognized in the cases of

State Tax on Foreign Held Bonds, 15 Wall. 300.
Railroad Co. *vs.* Jackson, 7 Wall. 262.
Union Bank *vs.* The State, 9 Yerger, 490.
See also Oliver *vs.* Washington Mills, 11 Allen, 268, 273.

It is hard to reconcile the settled doctrine that the non-resident alien bondholder is not taxable by our Government, with the proposition which the Government must sustain in order to succeed in this case, that though he is not taxable personally, his income derived from interest on what he has lent to American debtors is taxable on its way through the United States from his debtors to him. May we not rather say, in the language of this Court in the leading case of the State Tax on Foreign Held Bonds, this is "only one of many cases "where, under the name of taxation, an oppressive exaction is made "without constitutional warrant, amounting to little less than an "arbitrary seizure of private property. It is, in fact, a forced contri-

"bution levied upon property held in other States, where it is subjected " or may be subjected to taxation upon an estimate of its full value.

II. *c.* If the Court shall be satisfied that money appropriated by a Corporation within the United States to the payment of interest due its non-resident alien creditor, becomes at once the property of such creditor, the next step is easy, for there is no controversy as to the truth of the proposition that our Government has no power to tax the property of non-resident aliens. If authorities be needed, it is sufficient to cite

Railroad Co *vs.* Jackson.
State Tax on Foreign Held Bonds, *ubi supra.*

In the latter of these cases, the Court uses the following strong language: — " Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition," viz., that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

In the former of these cases, Mr. Justice Nelson said: — " To " permit the deduction of the tax from the coupons in question would " be giving effect to the Acts of the Legislature of Pennsylvania upon " property and interests lying beyond her jurisdiction." Is it not true that to sustain the tax in controversy would be to give effect to the Acts of the Congress of the United States upon property and interests lying beyond the jurisdiction of the United States?

SECOND.

But it may be said:—This is all very well, but it is not applicable to the case before the Court. You have paid your non-resident alien bondholder in full, and he is satisfied. Instead of paying him in full, you should have withheld from your payments to him the five per cent. tax imposed by the Act. If he had submitted to this, there would have been an end. If not, the question you raise might have been properly raised in a suit by him. As it is, he has no complaint to make, and you must take the consequence of your (as the Government says) unnecessary action in paying him in full instead of paying him with five per cent. off.

To this we reply: —

1. We were obliged to pay him, because we had contracted to do so, and because to do otherwise would have injured our foreign credit,

and it is common knowledge that all traders and, *a fortiori*, great Corporations, must keep their credit intact in the markets in which they borrow.

2. That we stand as if we had taken the amount of the tax which we forbore to withhold from our interest payments to our non-resident alien creditors, from a contingent fund, or charged it in suspense account, and look to the Government to make the deficit good; that our case is a case in which our bondholders, being non-resident aliens, were "for a special reason exempt from tax," within the principle of the case of Stockdale *vs.* the Insurance Companies, in the 20th Wallace, and that our proper course, therefore, was to pay them in full, pay the Internal Revenue tax under protest, and bring suit to recover the amount of the tax.

3. That if, instead of paying the interest in full, we had withheld the tax, we should not only have injured our credit, but injured it to no purpose, for —

*a*. If the non-resident alien bondholder could have found property of ours abroad, he would have seized it, to make good the deficit.

*b*. If he could not, or did not, he would have sued here, and obtained judgment, in which case the Government would have had to return the tax, and the result now sought in one suit would have been attained by two, unless this Court is prepared to negative the legal propositions laid down in the first division of this brief.

FRANCIS W. PALFREY,

*For the Michigan Central Railroad Company, Plaintiff in Error.*

13 Exchange St., Boston, Mass.,
November 20, 1879.

# In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE MICHIGAN CENTRAL RAILROAD Company
*vs.*
CHARLES W. SLACK, COLLECTOR, &c.
No. 124.

## BRIEF FOR THE DEFENDANT IN ERROR.

The coupon creditors in the present case were non-resident aliens, and, granting that if they had been citizens or residents the tax would have been legal, it is insisted by the plaintiff in error that because they were non-resident aliens it was illegal.

There is no doubt as to the meaning of the legislature. The act is quoted in the brief for this defendant in error in No. 123. So far as important here, it taxes coupons "*whenever and wherever the same may be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens.*" (14 Stat., 138.)

The question is, what provision of the Constitution of the United States is violated by the taxation of things belonging to non-resident aliens? The judiciary does

not profess to control Congress except so far as the latter may have violated the Constitution.

When taxed, the thing in question was within the jurisdiction of the United States. The rights of the non-resident aliens thereto were protected by the United States. If necessary, the whole force of the country, of every sort, would have been called out to enforce such rights, and in the mean time the latter were guaranteed by a general persuasion of the truth of this. The principle is the same as regards land, cattle, specie, stocks in corporations, or other choses in action. The tie reciprocal to that of *protection* binds all; and that is, in part, the duty of contributing to the support of the protecting machinery. (Catlin *v.* Hull, 21 Vermont, 152). The duty, so far as it falls *in rem*, seems the more absolute because in this particular instance it cannot be shared *in personam*. The resident alien contributes by his person to the strength of the protecting society, and so far is in a condition more favorable than that of the non-resident for protesting against burdens upon property.

The principle that choses in action follow the *situs* of the owner, once the rule as to all personal property, is a convenient one for many purposes, but, except in a country like England, which is so much a gainer thereby, has no proper application to matters of revenue. (Alvany *v.* Powell, 2 Jones, N. C., Eq., 51.) If Congress decides that from its situation as regards borrowing and lending this community may well adopt the opposite theory, it is difficult to say why such decision is not matter of plain legislative discretion, or who there is in our system of government that therein can say it nay.

The questions in the cases cited in the brief of the learned counsel for the plaintiff in error were in regard

to action by State authorities, and therefore stand upon different grounds. (Foreign-held Bonds, 15 Wall., 300; Murray *v.* Charleston, 96 U. S., 432.)

S. F. PHILLIPS,
*Solicitor-General.*